Supreme Court, U.S.
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No. 95-77

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

THOMAS BOTCHIE,

Petitioner,

V.

MICHAEL O'DOWD; AL CANNON, individually and in his official capacity as the SHERIFF OF CHARLESTON COUNTY; and the RETIREMENT DIVISION OF THE STATE OF SOUTH CAROLINA BUDGET AND CONTROL BOARD,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public law enforcement employee may properly maintain a claim for wrongful termination associated with speech which is entitled to limited First Amendment protection when there is evidence that the employee's speech and actions actually disrupted the public employment.

LIST OF PARTIES

Petitioner, Thomas G. Botchie, is a resident and citizen of the State of South Carolina.

Respondent, Michael O'Dowd, is a resident and citizen of the State of Georgia, however, was formerly the Sheriff of Charleston County, South Carolina.

Respondent, Retirement Division of the State of South Carolina State Budget and Control Board, is a political agency of the State of South Carolina.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

THOMAS G. BOTCHIE,
Petitioner,

-versus-

MICHAEL O'DOWD; AL CANNON, individually and in his official capacity as the SHERIFF OF CHARLESTON COUNTY; and the RETIREMENT DIVISION OF THE STATE OF SOUTH CAROLINA BUDGET AND CONTROL BOARD,
Respondents.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Michael O'Dowd and the Retirement Division of the State of South Carolina Budget and Control Board,

respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Thomas G. Botchie.

OPINIONS BELOW

The South Carolina Supreme Court affirmed the trial court's directed verdict in favor of O'Dowd and the Board rejecting Botchie's claims that his termination as Undersheriff violated his free speech rights under the First Amendment. The court's opinion is reported in 456 S.E.2d 403 and is reproduced in Appendix A to Botchie's Petition for Certiorari. (App. A, 38-45).

Following the South Carolina Supreme Court's issuance of the opinion, Botchie moved for a rehearing. The court denied that Petition on April 19, 1995. The court's denial is reproduced in Appendix B

to Botchie's Petition for Certiorari. (App. B, 46-47).

The oral order of the trial judge directing a verdict for O'Dowd and the Board at the conclusion of all of the evidence was not published. That order, however, was transcribed, and is reproduced in Appendix C to Botchie's Petition for Certiorari. (App. C, 48-51).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) in that the appeal is from a final judgment rendered by the highest court of the State of South Carolina and involves the Petitioner's rights under the United States Constitution.

STATEMENT OF THE CASE

In late February 1986, the late Honorable Charles F. Dawley hired Botchie as Undersheriff with the Charleston County Sheriff's Department (the "Sheriff's Department"). This employment commenced under a Letter of Appointment which provided that Botchie would serve as Undersheriff[1] "at the pleasure of the Sheriff."

Botchie began his law enforcement career while in the United States Air Force. In 1967, he moved into a civilian

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[1] The terms "'undersheriff' and 'deputy sheriff' are essentially synonymous positions under South Carolina common law." Botchie v. O'Dowd, 299 S.C. 329, 330 n. 1, 384 S.E.2d 727, 728 n. 1 (1989) ("Botchie I") (citing Allen v. Fidelity Deposit Co. of Maryland, 515 F. Supp. 1185 (D.S.C. 1981), affirmed, 694 F.2d 716 (4th Cir. 1982); Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943)). See also, Botchie v. O'Dowd, ___ S.C. ___, ___, 432 S.E.2d 458, 459 n.4 (1993) ("Botchie II").

law enforcement career with the Charleston County Police Department (the "CCPD") eventually advancing to the rank of lieutenant.[2] During his tenure as a lieutenant he supervised patrol officers, including O'Dowd.[3]

In 1980 Botchie returned to USAF active duty until he retired in 1986. He then returned to CCPD, however, left after only one (1) week to accept the position of Undersheriff under Sheriff Dawley. As Undersheriff, Botchie supervised all of the Sheriff's Department's divisions including more than thirty (30) people.

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[2] Botchie simultaneously served in the USAF reserves.

[3] See, Botchie I, 299 S.C. 329, 330, 384 S.E.2d 727, 728. Botchie, although the issue was contested, consistently maintained that he had suspended O'Dowd on two (2) separate occasions for abusing the CCPD's sick-leave policies.

In November 1987, when Sheriff Dawley died,[4] O'Dowd was appointed to serve as Sheriff.[5] As was customarily done, O'Dowd re-appointed all of his incoming deputies, except Botchie.

Shortly after Sheriff Dawley died, Botchie spoke with South Carolina State Senators Glenn McConnell and Sherry Martschink (the "Senators") regarding his desire to serve as Interim Sheriff.[6] The Senators advised Botchie that they had nothing to do with the eventual appointment, as it was entirely in Governor Campbell's hands.[7] After O'Dowd was appointed Sheriff, Botchie came to

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[4] See Id.; Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459.

[5] See, Id.; Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459.

[6] Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459.

[7] Id.

doubt the Senators' truthfulness and, in fact, suspected that they had politically assisted O'Dowd to become Sheriff.[8] Botchie had, in fact, lost faith in the Senators.[9]

After O'Dowd was sworn in, Botchie expressed his displeasure with the Senators' veracity to Jackie Steen ("Steen"), an officer in the local Charleston, South Carolina Republican Party.[10] The contents of that conversation eventually made its way back to, at least, O'Dowd and possibly to the Senators. On December 2, 1987, O'Dowd

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[8] Id., ___ S.C. ___, ___, 432 S.E.2d 458, 459-460.

[9] Botchie I, 299 S.C. 329, 331; 384 S.E.2d 727, 728.

[10] Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459-460.

terminated Botchie[11] and the Council denied Botchie's post-termination request for a hearing.[12]

After the termination, Botchie sued O'Dowd,[13] individually and in his official capacity as Sheriff of Charleston County, South Carolina for, inter alia, intentional violation of civil rights and wrongful discharge.[14] O'Dowd was granted summary judgment and Botchie appealed.

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[11] Botchie I, 299 S.C. 329, 330, 384 S.E.2d 727, 728; Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 460.

[12] Id., Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 460.

[13] The Respondents are collectively referenced through O'Dowd.

[14] The Defendants, Charleston County Council (the "Council") and the Retirement Division of the State Budget and Control Board (the "Board"), were added as necessary parties in the Amended Complaint. The Honorable J. Alton Cannon, Jr. ("Sheriff Cannon") was also added as a necessary party when he succeeded O'Dowd as Charleston County Sheriff. See, Rule 25(d)(1), SCRCP.

The South Carolina Supreme Court affirmed in part and reversed in part.[15] The Supreme Court affirmed dismissal of the Council,[16] however, reversed dismissal of O'Dowd and the Board.[17]

On remand, Botchie filed a Second Amended Complaint. In January 1992, his case went to trial before a jury. When Botchie rested, the Trial Judge directed a verdict for O'Dowd. Botchie again appealed and the South Carolina Supreme Court affirmed in part and reversed in part.[18] The Supreme Court upheld the directed verdicts on the implied contract

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[15] See, Botchie I, 299 S.C. 329, 384 S.E.2d 727 (1989).

[16] Id., 299 S.C. 329, 333-334, 384 S.E.2d 727, 729-730.

[17] Id., 299 S.C. 329, 331-333, 384 S.E.2d 727, 729.

[18] See Botchie II, ___ S.C. ___, 432 S.E.2d 458 (1993).

and defamation causes of action,[19] however, remanded for a trial on the retaliatory discharge and First Amendment counts.[20]

In January 1994, another jury heard Botchie's remaining claims. At the conclusion of the entire case, the Trial Judge directed a verdict for O'Dowd. Botchie appealed and the South Carolina Supreme Court affirmed the directed verdict.[21] The Supreme Court denied his Petition for Rehearing and this Petition for Writ of Certiorari followed.

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[19] Id., ___ S.C. ___, ___, 432 S.E.2d 458, 460-461.

[20] Id., ___ S.C. ___, ___, 432 S.E.2d 458, 461-462.

[21] Botchie v. O'Dowd, ___ S.C. ___, 456 S.E.2d 403 (1995) ("Botchie III").

SUMMARY OF THE ARGUMENT

The South Carolina Supreme Court properly affirmed the trial court's directed verdict on Botchie's claims. The evidence overwhelmingly indicated that Botchie's speech and actions caused actual disruption in the Charleston County Sheriff's Department.

REASONS FOR DENYING THE WRIT

THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED THIS COURT'S FIRST AMENDMENT BALANCING TEST FROM *CONNICK V. MYERS* TO DETERMINE THAT O'DOWD'S INTERESTS IN MAINTAINING AN ORDERLY AND EFFICIENT SHERIFF'S DEPARTMENT OUTWEIGHED BOTCHIE'S FREE SPEECH RIGHTS.

The South Carolina Supreme Court correctly applied this Court's balancing test from Connick v. Myers, 461 U.S. 138 (1983), to affirm the Trial Court's directed verdict to O'Dowd. The evidence presented during the trial demonstrated

that Botchie's actions disrupted the activities of the Sheriff's Department. O'Dowd was entitled to a directed verdict. See, Botchie v. O'Dowd, ___ S.C. ___, ___, 432 S.E.2d 458, 462 (1993) ("Botchie II").

The First Amendment's guarantee of free speech is not absolute. Beard v. Alexandria, 341 U.S. 622, 642 (1951). This is particularly true for public employees, as "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulating the speech of its citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

A. Two-Prong Balancing Test

In Botchie II, the South Carolina Supreme Court noted that this Court, in Connick, established a two-prong test for

determining when the discharge of a public employee for speech activity violated the First Amendment. The threshold issues are:

(1) Does the speech implicate a matter of public concern?

(2) If so, does Employer's interest in the effective and efficient fulfillment of its responsibilities to the public outweigh the Employee's interest in free speech?

Botchie II, ___ S.C. ____, ____, 432 S.E.2d 458, 461 (citing Connick, 461 U.S. 138, 142). The South Carolina Court determined that "Botchie's speech regarding Republicans, being both of public concern and of personal concern to Botchie, was entitled to limited First Amendment protection." Id.

While the First Amendment applies to public employees, "it does not insulate the employee from disciplinary action by the employer for statements unrelated to

matters of public concern that affect the conduct of the employer's business." Kenna v. United States Department of Justice, 727 F. Supp. 64, 69 (D.N.H. 1989). If the employee is able to demonstrate both of these threshold requirements, then he must also present evidence that his engaging in the protected activity was the motivating or "but for" cause of his discharge. See, Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 880 (4th Cir. 1984); Botchie III, ___ S.C. ___, ___, 456 S.E.2d 403, 405. This requirement has been authoritatively established. See, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410, 417 (1979).

B. Evidence Of Disruption

In Botchie II, the South Carolina Supreme Court reversed O'Dowd's directed verdict granted to O'Dowd since the only evidence presented was Botchie's testimony and certain deposition testimony.[22] Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 461-462. There had been

> no evidence . . . offered by O'Dowd to demonstrate that Botchie's speech had a 'detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speakers duties or interfere[d] with the regular operation of the enterprise.'

Id., ___ S.C. ___, ___, 432 S.E.2d 458, 462 (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

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[22] The deponent, Melvin Simmons, a former Sheriff's Department deputy, died prior to either trial. See, Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 461-462.

Even though "it was not necessary that O'Dowd 'allow events to unfold to the extent that the disruption of the office and the destruction of working relationships [was] manifest . . .'" Id. (quoting Connick, 461 U.S. 138, 152), O'Dowd was required to make "some showing of actual disruption or disloyalty was required." Id. (Emphasis in original).[23]

O'Dowd testified in the second trial and the record was replete with evidence that O'Dowd "believed [that] Botchie had uttered disloyal comments undermining his

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[23] Botchie II held that Botchie's statements regarding the Senators was entitled to limited Constitutional protection. Id., ___ S.C. ___, ___, 432 S.E.2d 458, 461. This is consistent with the position that, to the extent a public employee's expression is in furtherance of matters of personal concern, the public employee's burden of showing the predominance of the public interest in continuing the efficient functioning of a public entity is lessened. See, Joyner v. Lancaster, 815 F.2d 20, 24 (4th Cir. 1987) cert. denied, 484 U.S. 830 (1987).

standing with the public and damaging his ability to operate the Sheriff's Department. Botchie III, ___ S.C. ___, ___, 456 S.E.2d 403, 405. Certainly, the South Carolina Supreme Court's decision to affirm the directed verdict for O'Dowd was proper, since Botchie could not satisfy Connick's threshold requirements.

The application of the Connick analysis, applicable herein by Botchie II, has been[24] continuously refined. In Rankin, 483 U.S. 378, and in Mt. Healthy, 429 U.S. 274, this Court reiterated and refined the Connick analysis. Botchie had the initial burden to demonstrate that his conduct and speech were constitutionally protected. See, Mt. Healthy, 429 U.S. 274, 287. In Botchie II, the South

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[24] The Connick analysis is a reiteration of the balance test first set forth in Pickering, 391 U.S. 563.

Carolina Supreme Court said Botchie's speech was entitled to "limited First Amendment protection." Id., ___ S.C. ___, ___, 432 S.E.2d 458, 461.

C. Employee's Rights vs. Employer's Rights

The trial court and, indeed, the South Carolina Supreme Court, were required to balance the competing interests and rights of the employee (i.e., Botchie) against those of the employer (i.e., O'Dowd). Connick, 461 U.S. 138, 150. A court must:

> balance the strength of the employee's First Amendment interest, and any parallel public interest in the information which the employee sought to impart, against the strength of the countervailing governmental interest in promoting efficient performance of the public service the government agency or entity must provide through its employees.

O'Connor v. Steeves, 994 F.2d 905, 912 (1st Cir. 1993), cert. denied sub nom., Town of Nahant, Massachusetts v. O'Connor, ___ U.S. ___, 114 S. Ct. 634 (1993) (citing Pickering, 391 U.S. 563, 568). The resolution of this critical issue is a matter of law for a judge to decide, and not an issue of fact. See, Connick, 461 U.S. 138, 150 n.7; Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) cert. denied, 484 U.S. 830 (1987); Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986). The Pickering balance analysis espoused by this Court in Connick requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the pu blic. Id. (Emphasis added).

1. Employment As Law Enforcement Officer

Moreover, the type of employment in issue directly bears on the amount of weight an employee's rights are to be given under the Connick analysis. Courts consistently acknowledge that police officers have more limited First Amendment rights in their employment than do other public employees. Jurgensen, 745 F.2d 868, 880. Freedoms are often denied police officers due to the discipline demanded of them by their profession. Id. (citing Kannisto v. City and County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977) (emphasizing police department's interest in discipline, *esprit de corps*, and uniformity); Gasparinetti v. Kerr, 568 F.2d 311, 321 (3d Cir. 1977) (Rosen, J., dissenting in part), cert. denied, 430 U.S. 931 (1977) ("police forces are a

para-military force.")). See also, Maciaereillo v. Sumner, 973 F.2d 295, 300 (4th Cir. 1992) (citing Hughes v. Whitmer, 714 F.2d 1407, 1408 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984); Kelly v. Johnson, 425 U.S. 238 (1976)). There is "greater latitude . . . afforded to [law enforcement] department officials in dealing with dissention in their ranks." Maciaereillo, 973 F.2d 295, 300 (citing Hughes, 714 F.2d 1407, 1419).

In addition, the courts pay close attention to the type of position held by the public employee. Where an employee "serves no confidential, policy making, or public contact role, the danger to the agency's successful functioning from the employee's private speech is minimal." Rankin, 483 U.S. 378, 390-391. Conversely, where the employee holds a confidential, policymaking, or public

contact role, the danger to the agency's successful function by the employee's speech is much greater. Botchie's position as Undersheriff undeniably fit into the latter category and was an important consideration for the South Carolina Supreme Court in trying to reach the proper balance of the competing interests at stake.

D. Analysis Not Undertaken In A Vacuum

Importantly, "[i]n performing the balancing [analysis], the statement[s made by the employee] will not be considered in a vacuum; the manner, time and place of the employee's expression are relevant, as is the context in which the dispute arose." Rankin, 483 U.S. 378, 388. See, Givhan, 439 U.S. 410, 415 n.4; Botchie III, ___ S.C. ___. ___, 456 S.E.2d 403, 405 (citing Connick, 461 U.S. 138, 152-

154). Finally, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. 138, 150. (Emphasis added).

In this case, the South Carolina Supreme Court found that

> the [T]rial [J]udge properly considered all of the evidence surrounding Botchie's discharge in ascertaining whether O'Dowd acted in good faith upon a reasonable belief that Botchie's speech demonstrated disloyalty or created disruptions to the Sheriff's Department.

Botchie III, ___ S.C. ___, ___, 456 S.E.2d 403, 405-406.

1. Destruction of Trusting Relationship

It is imperative that the Sheriff and Undersheriff have a close, harmonious, trustful working relationship in order for the Sheriff's Department to function

effectively. See, Joyner, 815 F.2d 20, 24 (discussing the importance of mutual loyalty and confidence between a sheriff and former captain in sheriff's department). See also, Pierson v. Gondles, 693 F. Supp. 408 (E.D. Va. 1988). That was not the case between O'Dowd and Botchie. O'Dowd, himself, best described the reason he terminated Botchie from his position as Undersheriff:

> Because I was convinced in my heart that Tom [Botchie] was doing whatever he could to make sure I did not get re-elected (sic). He was telling people I was unqualified for the job. He was telling people I should not have gotten the appointment, and this was the man representing the Sheriff's Department when I'm not there. There was no working relationship. I did not trust him . . .

2. Problems Within the Sheriff's Department

In addition, the strained relationship between Botchie and O'Dowd

"created a very divisive atmosphere within the [Sheriff's] [D]epartment because people did not know where they stood or what they should do or who they should listen to or what was going on." Botchie reportedly became enraged when Governor Campbell appointed O'Dowd as Sheriff and threw furniture around the main office of the Sheriff's Department. All of this conduct culminated in "causing a number of personal frictions in the office." Officials and employees within the Sheriff's Department were unsure where to turn, as the second-in-command openly questioned O'Dowd's ability to serve as Sheriff.

Where continuous criticism erodes the relationship between a superior and his subordinates, the First Amendment will not insulate the employee "from the consequences of his continuing

intransigence." Kenna, 727 F. Supp. 64, 73. See also Pierson, 693 F. Supp. 408, 413.

As this Court noted in Rankin, 483 U.S. 378, 388, this balancing analysis cannot be performed in a vacuum, but must be considered in light of the surrounding facts and circumstances. See also, Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993) (court should not divide overall speech into discrete components to conduct a constitutional analysis on each). In Kenna, 727 F. Supp. 64, the District Court noted that:

> Situations of this type rarely involve a single statement. More commonly, they involve multiple utterances made over a period of time and on a variety of subjects. Furthermore, they are frequently difficult to characterize and relating exclusively to matters of public concern or private interest . . . . In essence, what is

> required is a case-by-case approach in which close calls must sometimes be made.

Id., 727 F. Supp. 64, 70.

It is axiomatic that when the top two ranking officials in the Sheriff's Department cannot work together because of distrust and disloyalty, some disruption to the department is, at best, inherently bound to occur. Joyner, 815 F.2d 20, 23-24; Jurgensen, 745 F.2d 868, 880-882. As the South Carolina Supreme Court noted in Botchie II, "it was not necessary that O'Dowd 'allow events to unfold to the extent that the disruption of the office and the destruction of working relationships was manifest' . . ." Id., ___ S.C. ___, ___, 432 S.E.2d 458, 462 (citing Connick, 461 U.S. 138, 152).

O'Dowd was only required to show some disruption within the Sheriff's Department and he complied with that requirement.

The South Carolina Supreme Court's affirmation of the Trial Court's directed verdict should be affirmed. Botchie's Petition for Writ of Certiorari should be denied.

A TRIAL COURT CORRECTLY APPLIES THE CONNICK BALANCING TEST BEFORE ALLOWING THE JURY TO DETERMINE ANY ISSUES OF FACT RELATING TO CAUSATION

The two (2) underlying threshold issues in the Connick balancing test are to be determined by the court, and not the jury. Id., 461 U.S. 138. If the court concludes that either one of these requirements has not been satisfied, then the inquiry ends and there is no issue for a jury to consider. In order to avoid the directed verdict on his First Amendment claim, Botchie had to establish a *prima facie* case of a violation by showing that he engaged in protected speech or activity

and that the speech or activity was a substantial factor in the resulting action.

It is evident that Connick and its progeny have all envisioned the trial court making these primary findings before allowing the case to go to the jury. See, Dwyer v. Smith, 867 F.2d 184, 193 (4th Cir. 1989). The Fourth Circuit has held that the jury has no role to play whatsoever in trying to assist the court in determining the proper balance under Connick. See, Joyner, 815 F.2d 20, 23.

To adopt Botchie's proposed First Amendment analysis, courts would regularly allow cases to go to a jury for determination regardless of the fact that the trial court is required to rule as a matter of law on the first two requirements under Connick. This would lead to confusion and to an unnecessary

number of trials being held under the ambit of the First Amendment.

Botchie asserts that the trial court could weigh O'Dowd's purported justifications for his termination without factual findings by the jury only if there was no dispute about why Botchie was fired. It is well established that the weighing or balancing process required by Connick should be performed by Judge Short prior to the case being submitted to a jury.

The Trial Court, and the South Carolina Supreme Court, correctly applied the Connick balancing test to this case. Botchie's argument that Judge Short should have first submitted the case to the jury for factual determination is meritless. Regardless of the jury's conclusions, the Trial Court, when assessing the balance as a matter of law, would be forced to grant

judgment to O'Dowd for the very same reason that it directed a verdict for him at trial. Regardless of the approach taken, the result would be the same. Botchie cannot and has not presented sufficient evidence to pass Connick's threshold requirements. Botchie failed to prove that his free speech rights outweighed O'Dowd's interests in maintaining an efficient and harmonious operation at the Sheriff's Department. Botchie's arguments that "but for" causation had to first be decided by a jury is incorrect.

CONCLUSION

O'Dowd and the Board prays that this Court deny Botchie's Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review,

and because the lower court's holding was not in error.

Respectfully submitted,

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